20150252

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Lynh Hong Musick, Appellant, v. Grant Levi, Director of the North Dakota Department of Transportation, Appellee.	)	**Supreme Ct. No. 20150252** **District Ct. No. 45-2015-CV-00240**

APPEAL FROM THE DISTRICT COURT
JUDGMENT DATED JUNE 26, 2015
STARK COUNTY, NORTH DAKOTA
SOUTHWEST JUDICIAL DISTRICT

HONORABLE ZANE ANDERSON

BRIEF OF APPELLEE

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[¶2] Whether Musick's argument that North Dakota's implied consent and test refusal laws impose an unconstitutional condition have been rejected by this Court?

[¶3] Whether Musick waived her argument that she was improperly denied her right to cure her refusal of the chemical test under N.D.C.C. § 39-20-04(2) by failing to properly preserve the issue?

STATEMENT OF CASE

[¶4] Deputy Dan Kensinger (Deputy Kensinger) arrested Lynh Hong Musick (Musick) on December 27, 2014, for the offense of driving a vehicle while under the influence of intoxicating liquor. Transcript (Tr.) Exhibit (Ex.) 1b. A Report and Notice, including a temporary operator's permit, was issued to Musick after Musick refused to submit to a chemical test requested by Deputy Kensinger. The Report and Notice notified Musick of the Department's intent to revoke her driving privileges. Musick requested a hearing in accordance with N.D.C.C. § 39-20-05. Tr. Ex. 1c. The administrative hearing was held on January 21, 2015, at which time the hearing officer considered two sets of issues as law enforcement alleged Musick refused to submit to requests for an onsite screening test and a chemical Intoxilyzer test. In accordance with N.D.C.C. 39-20-05(3) the hearing officer considered the following issues regarding Musick's refusal of the on-site screening test:

(1) Whether a law enforcement officer had reason to believe the person committed a moving traffic violation or was involved in a traffic accident as a driver;

(2) Whether in conjunction with the accident or violation, the officer has, through the officer's observations, formulated an opinion that the person's body contains alcohol; and

(3) Whether [Musick] refused to submit to the onsite screening test.

Tr. Ex. 2. The hearing officer also considered the following issues in regards to Musick's refusal of the alcohol concentration test:

(1) Whether a law enforcement officer had reasonable grounds to believe the person had been driving or was in actual physical control of a vehicle while under the influence of intoxicating liquor or any drug or substance in violation of N.D.C.C. section 39-08-01, or equivalent ordinance;

(2) Whether the person was placed under arrest; and

(3) Whether the person refused to submit to the test or tests.

Tr. Ex. 2.

[¶5] Following the hearing, the hearing officer issued her findings of fact, conclusions of law, and decision revoking Musick's driving privileges for a period of 180 days. Musick submitted a Petition for Reconsideration, which the hearing officer denied. Musick requested judicial review of the Hearing Officer's Decision.

STATEMENT OF FACTS

[¶6] On December 27, 2014, at approximately 10:38 p.m., Deputy Kensinger observed a vehicle drive through a red light at the corner of 9th Street and 3rd Avenue in Dickinson, North Dakota. Tr. 5, ll. 5-16; Ex. 1b. Deputy Kensinger activated his patrol car's emergency lights and siren to initiate a stop of the vehicle. Tr. 5, ll. 18-19. The vehicle did not immediately stop but continued down 3rd Avenue before stopping at a red light in the westbound turn lane of 12th

Street and 3rd Avenue. Tr. 5, ll. 19-23. Deputy Kensinger stopped his patrol car behind the vehicle, exited and approached the vehicle on foot to make contact with the driver. Tr. 5, l. 23 – Tr. 6, l. 3. Deputy Kensinger observed a lone female in the driver's seat and knocked on the window to get her attention. Tr. 6, ll. 5-8. Deputy Kensinger heard the vehicle engine revving loudly, and when the light turned green the vehicle turned westbound on 12th Street at a high rate of speed. Tr. 6, ll. 10-13.

[¶7] Deputy Kensinger ran back to his patrol car, notified dispatch of the vehicle and situation, and proceeded after the vehicle. Tr. 6, l. 23 – Tr. 7, l. 1. About a quarter of a mile later the vehicle pulled into the parking lot of the Armies Bar and stopped in between two parking spaces. Tr. 7, ll. 3-16. Deputy Kensinger pulled in behind the vehicle and again approached the driver's side of the vehicle on foot. Tr. 7, ll. 22-23. Deputy Kensinger asked the driver to roll her window down but the driver sat there staring at the deputy. Tr. 8, ll. 13-16. Deputy Kensinger again asked for the driver, later identified as Musick, to roll down the window and exit the vehicle. Tr. 8, ll. 18-19. Musick shrugged her shoulder and pointed at the door handle. Tr. 8, ll. 19-21. Deputy Kensinger opened the door and made contact with Musick. Tr. 8, ll. 21-22.

[¶8] Deputy Kensinger asked Musick why she did not stop while he was attempting to make contact with her earlier, and Musick provided no response. Tr. 8, l. 24 – Tr. 9, l. 2. Observing that the vehicle was a manual transmission and seeing the emergency brake was not activated, Deputy Kensinger asked Musick to make sure the vehicle was in park. Tr. 9, ll. 2-9. Musick responded

"go ahead," and then a few moments later indicated it was in park. Tr. 9, ll. 10-13. When Musick exited the vehicle, the vehicle began to roll backwards into the patrol car and Deputy Kensinger reached into the vehicle and activated the emergency brake to prevent it from rolling into the patrol car. Tr. 9, ll. 13-17.

[¶9] Deputy Kensinger detected the strong odor of alcohol coming from Musick's breath. Tr. 9, l. 25 – Tr. 10, l. 2. Musick had bloodshot watery eyes, and poor balance. Tr. 10, ll. 2-5. Musick acknowledged she had been drinking. Tr. 11, ll. 9-10. Musick was verbally defiant to the deputy's questioning and would not agree to submit to field sobriety tests. Tr. 11, ll. 13-16.

[¶10] Deputy Kensinger read the implied consent advisory and asked Musick if she would consent to an onsite screening test, and Musick refused. Tr. 11, ll. 18-21. Deputy Kensinger told Musick she was under arrest for driving under the influence. Tr. 12, ll. 9-11. Deputy Kensinger transported Musick to the Stark County Law Enforcement Center. Tr. 13, l. 7. Deputy Kensinger attempted again to read the implied consent advisory, but Musick tried several times to grab the advisory card out of the deputy's hands. Tr. 13, ll. 17-20. Musick then grabbed a nearby notebook and threw it at the deputy. Tr. 13, ll. 21-22. Deputy Kensinger eventually completed a reading of the full advisory and requested Musick submit to a chemical test, but she refused to provide an answer. Tr. 14, ll. 1-2. Deputy Kensinger took Musick's lack of cooperation as a refusal. Tr. 14, ll. 2-3. Deputy Kensinger issued Musick a Report and Notice. Tr. 14, ll. 11-13.

[¶11] Musick requested a hearing. Tr. Ex. 1c. The hearing was held on January 21, 2015. Tr. 1; Tr. Ex. 2. Following Deputy Kensinger's testimony on

the refusal issues identified in the Notice of Hearing, Musick requested the Department consider the statutory issues when a driver provides chemical test results over the legal limit, and allow her to cure her refusal in accordance with N.D.C.C. § 39-20-04(2). Tr. 16, l 18 – Tr. 17, l. 4. The hearing officer took the issue under advisement and in her decision determined she did not have authority to substitute the suspension issues in place of the revocation issues. Tr. 26, ll. 19-20.

PROCEEDINGS ON APPEAL TO DISTRICT COURT

[¶12] Musick requested judicial review of the Hearing Officer's Decision by the Stark County District Court in accordance with N.D.C.C. § 39-20-06. App. 19-21. On appeal, Musick raised various arguments claiming North Dakota's implied consent laws are unconstitutional. Id.

[¶13] The district court issued its Memorandum Opinion and Order Affirming the Hearing Officer's Decision on June 22, 2015. App. 22-27. Judgment was entered on January 26, 2015. App. 29. Musick appealed the Judgment to this Court. App. 32-35. On appeal, the Department requests this Court affirm the Judgment of the Stark County District Court and the Hearing Officer's Decision revoking Musick's driving privileges for a period of 180 days.

STANDARD OF REVIEW

[¶14] "An appeal from a district court decision reviewing an administrative license suspension is governed by the Administrative Agencies Practice Act, Chapter 28-32, N.D.C.C." McPeak v. Moore, 545 N.W.2d 761, 762 (N.D. 1996). "This Court reviews the record of the administrative agency as a basis for its

decision rather than the district court decision." Lamb v. Moore, 539 N.W.2d 862, 863 (N.D. 1995) (citing Erickson v. Dir., N.D. Dep't of Transp., 507 N.W.2d 537, 539 (N.D. 1993). "However, the district court's analysis is entitled to respect if its reasoning is sound." Kraft v. State Bd. of Nursing, 2001 ND 131, ¶ 10, 631 N.W.2d 572.

[¶15] This Court's review "is limited to whether (1) the findings of fact are supported by a preponderance of the evidence; (2) the conclusions of law are sustained by the findings of fact; and (3) the agency's decision is supported by the conclusions of law." McPeak, 545 N.W.2d at 762 (citing Zimmerman v. N.D. Dep't of Transp. Dir., 543 N.W.2d 479, 481 (N.D. 1996)).

[¶16] Findings by an administrative agency are sufficient if the reviewing court is able to understand the basis of the fact finder's decision. In re Boschee, 347 N.W.2d 331, 336 (N.D. 1984). A court must not make independent findings of fact or substitute its judgment for that of the agency. Bryl v. Backes, 477 N.W.2d 809, 811 (N.D. 1991). Rather, a reviewing court determines only "whether a reasoning mind reasonably could have determined that the factual conclusions reached were proved by the weight of the evidence from the entire record." Id. (citation omitted).

[¶17] "When an 'appeal involves the interpretation of a statute, a legal question, this Court will affirm the agency's order unless it finds the agency's order is not in accordance with the law.'" Harter v. N.D. Dep't of Transp., 2005 ND 70, ¶ 7, 694 N.W.2d 677 (quoting Phipps v. N.D. Dep't of Transp., 2002 ND 112, ¶ 7, 646 N.W.2d 704). The "[i]nterpretation of a statute is a question of law fully reviewable on appeal." State v. Fasteen, 2007 ND 162, ¶ 8, 740 N.W.2d 60.

LAW AND ARGUMENT

I. North Dakota's implied consent and criminal refusal laws do not violate Musick's rights under the Fourth Amendment and the due process clause.

[¶18] Musick unnecessarily raises various *lengthy* constitutional challenges to North Dakota's implied consent and test refusal laws. The Department asserts these arguments are in direct opposition to and completely ignore controlling decisions of this Court. See, e.g., State v. Baxter, 2015 ND 107, 863 N.W.2d 208, *pet. for cert. filed*, (U.S. Aug. 26, 2015)(No. 15-243); State v. Washburn, 2015 ND 8, 861 N.W.2d 173, *pet. for cert. filed*, (U.S. June 16, 2015)(No. 14-1469); Beylund v. Levi, 2015 ND 18, 859 N.W.2d 403, *pet. for cert. filed*, (U.S. June 23, 2015)(No. 14-1507); State v. Birchfield, 2015 ND 6, 858 N.W.2d 302 *pet. for cert. filed*, (U.S. June 16, 2015)(No. 14-1468); State v. Smith, 2014 ND 152, 849 N.W.2d 599; Herrman v. N.D. Dep't of Transp., 2014 ND 129, 847 N.W.2d 768; McCoy v. N.D. Dep't of Transp., 2014 ND 119, 848 N.W.2d 659. In fact, based upon this existing precedent, the Court most recently summarily affirmed judgments without discussion of similar challenges by Musick's counsel. See, e.g., Mesch v. Levi, 2015 ND 86, 865 N.W.2d 124 Wojahn v. Levi, 2015 ND 50, 861 N.W.2d 173, *pet. for cert. filed*, (U.S. July 28, 2015)(No. 15-129), Culver v. Levi, 2015 ND 26, 861 N.W.2d 172, *pet. for cert. filed*, (U.S. June 23, 2015)(No. 14-1508). Therefore, the Department asserts that responses to each and every point asserted by Musick are unnecessary as having previously been rejected by this Court.

[¶19] For example, in Birchfield, at ¶ 19, this Court "conclude[d] the criminal refusal statute is not unconstitutional under the Fourth Amendment or N.D. Const. art. I, § 8." In reaching its decision, this Court again emphasized the United States Supreme Court recognition in Missouri v. McNeely, -- U.S. --, 133 S.Ct. 1552, 1568 (2013) (plurality decision), of implied consent statutes as being "acceptable 'legal tools' with 'significant consequences' for refusing to submit to testing which are available to the states as alternatives to warrantless, nonconsensual blood draws . . ." Birchfield, at ¶ 13. The Court also recognized the *growing number* of post-McNeely decisions from other jurisdictions in which "criminal refusal statutes have continued to withstand Fourth Amendment challenges." Id. at ¶ 12; see, e.g., State v. Brooks, 838 N.W.2d 563, 572 (Minn. 2013), cert. denied, 134 S. Ct. 1799 (2014); State v. Yong Shik Won, 332 P.3d 661, 681-82 (Haw. Ct. App. 2014), cert. granted, 2014 WL 2881259 (Haw. June 24, 2014), Hoover v. Ohio, 549 F. Appx. 355, 356-57 (6th Cir. 2013) (per curiam); United States v. Muir, No. 8:13-mj-03005-TMD, 2015 WL 2165570, at *11 (D. Md. May 7, 2015).

[¶20] In reaching its decision in Birchfield, at ¶¶ 13-16, the Court also differentiated that line of warrantless, suspicionless search cases, which Musick would argue support his position such as Camara v. Municipal Court of City & County of San Francisco, 387 U.S. 523 (1967); See v. City of Seattle, 387 U.S. 541, 546 (1967); and Lebron v. Secretary of Florida Department of Children and Families, 772 F.3d 1352, 1378 (11th Cir. 2014). For example, the Court stated "[u]nlike the regulation in Camara which allowed for suspicionless searches of

private property, implied consent laws, like North Dakota law, do not authorize chemical testing unless an officer has probable cause to believe the defendant is under the influence, and the defendant will already have been arrested on the charge." Birchfield at ¶ 15. "Unlike the regulation in Camara, the test refusal statute criminalizes the refusal to submit to a chemical test but does not authorize a warrantless search." Id. "Furthermore, reliance on Camara 'overlooks the apparent difference between the way the Supreme Court treats cases in which the Fourth Amendment affects searching individuals by testing in the drunk-driving context and those where it affects a home search in any context.'" Id. (quoting State v. Chasingbear, No. A14-0301, 2014 WL 3802616, at *14 (Minn. Ct. App. Aug. 4, 2014) (unpublished opinion).

[¶21] With respect to cases such as See and Lebron, the Court stated "[b]ecause none of these cases were decided in the context of drunk-driving prosecutions where an officer had probable cause to search a defendant's body, we do not believe they are helpful in determining whether criminalizing a defendant's refusal to submit to a chemical test when an officer has probable cause to believe the defendant is under the influence of alcohol violates a defendant's Fourth Amendment rights." Id. at ¶ 16. The Court continued "[i]ndeed, the Supreme Court has said 'the Constitution does not forbid every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights.'" Id. (quoting Jenkins v. Anderson, 447 U.S. 231, 236 (1980) (citation omitted)).

[¶22] Similarly, in Baxter this Court rejected a driver's challenge to North Dakota's test refusal law on substantive due process grounds. 2015 ND 107, 863 N.W.2d 208, *pet. for cert. filed*, (U.S. Aug. 26, 2015)(No. 15-243). The Court found Baxter had not cited to any authority holding refusal of an onsite screening test or chemical test implicated a fundamental right. Id. at ¶ 15. Further, the Court stated, "[b]ut even if the right of refusal implicates a fundamental right, we have recently held, '[i]t is clear that the State has a compelling state interest in regulating intoxicated drivers,' Beylund, 2015 ND 18, ¶ 27, 859 N.W.2d 403, and the often-stated reason for this conclusion need not be restated here." Id. at ¶ 16 (citations omitted). Musick's identical argument, therefore, fails for the same reasons.

II. North Dakota's implied consent laws do not impose an unconstitutional condition on drivers in exchange for receiving driving privileges.

[¶23] "Generally speaking, the doctrine [of unconstitutional conditions] provides the government ordinarily may not grant a benefit conditioned on the surrender of a constitutional right, even if the government may withhold the benefit altogether." Beylund, 2015 ND 18 at ¶ 18 (citing 16A Am. Jur. 2d Const. Law § 411 (2009 & Supp. 2014)). "However, under the doctrine, the government may lawfully impose conditions, including the surrender of a constitutional right, provided the conditions are reasonable." Id. "Therefore, even if the unconstitutional conditions doctrine applies to the Fourth Amendment, it does not necessarily mean a constitutional violation occurred." Id.

[¶24] After conducting a comprehensive review of the caselaw – including that unrelated caselaw provided by Musick on appeal in this matter – this Court stated "we are not convinced the implied consent law is invalid under the unconstitutional conditions doctrine." Id. at ¶ 30. The Court "conclude[d] North Dakota's implied consent law as challenged, either on its face or as applied, does not violate the Fourth Amendment of the United States Constitution applying either general Fourth Amendment principles or under the doctrine of unconstitutional conditions." Id. at ¶ 31.

III. Musick has waived the argument that she was improperly denied her right to cure her refusal of the chemical test under N.D.C.C. § 39-20-04(2) by failing to properly preserve the issue.

[¶25] Musick failed to meet the statutory requirements for curing her refusal by pleading guilty to DUI. N.D.C.C. § 39-20-04(2) provides that "[a] person's driving privileges are not subject to revocation if **all** of the following criteria are met:

> a. An administrative hearing is not held under section 39-20-05;
>
> b. The person mails an affidavit to the director within twenty-five days after the temporary operator's permit is issued. The affidavit must state that the person:
>
> > (1) Intends to voluntarily plead guilty to violating section 39-08-01 or equivalent ordinance within twenty-five days after the temporary operator's permit is issued;
> >
> > (2) Agrees that the person's driving privileges must be suspended as provided under section 39-06.1-10;
> >
> > (3) Acknowledges the right to a section 39-20-05 administrative hearing and section 39-20-06 judicial review and voluntarily and knowingly waives these rights; and
> >
> > (4) Agrees that the person's driving privileges must be revoked as provided under this section without an

> administrative hearing or judicial review, if the person does not plead guilty within twenty-five days after the temporary operator's permit is issued, or the court does not accept the guilty plea, or the guilty plea is withdrawn.
>
> c. The person pleads guilty to violating section 39-08-01 or equivalent ordinance within twenty-five days after the temporary operator's permit is issued;
>
> d. The court accepts the person's guilty plea and a notice of that fact is mailed to the director within twenty-five days after the temporary operator's permit is issued; and
>
> e. A copy of the final order or judgment of conviction evidencing the acceptance of the person's guilty plea is received by the director prior to the return or reinstatement of the person's driving privileges.

Id. It is apparent under this law that Musick does not qualify for curing her refusal because an administrative hearing under N.D.C.C. § 39-20-05 was held. Further, under the record there is no evidence that Musick mailed an affidavit to the director within 25 days after her temporary operator's permit was issued. And lastly, Musick acknowledges not pleading guilty to DUI within 25 days.

[¶26] Yet, Musick argues the "Hearing Officer erred because [she] should have been permitted to cure her refusal at the hearing" and "not providing [her] that opportunity denies her equal protection rights because she had not been charged with DUI at the time of her hearing (classification) and could only plead to refusal." Appellant's Br. ¶ 56. Musick's arguments are meritless.

[¶27] Musick's argument is factually erroneous because there was no evidence presented at the administrative hearing as to Musick's criminal charges. This Court has repeatedly held that appellate review is limited to the record filed with the court. See Stenvold v. Workforce Safety & Ins., 2006 ND 197, ¶ 10, 722

N.W.2d 365 (stating, "[a]n appeal of an administrative agency decision to the district court invokes that court's appellate jurisdiction. The district court's appellate review is expressly limited to the agency record filed with the court."); In re Guon, 38 N.W.2d 280, 283 (N.D. 1949) ("On an appeal under the Administrative Agencies Uniform Practice Act the review in the district court is restricted to the record that was made in and certified by the administrative agency."). Musick's criminal case documents were not offered at the hearing and are not properly before the Court. At the hearing the following dialogue occurred between Musick and her counsel regarding her desire to cure her refusal under N.D.C.C. § 39-20-04(2).

Mr. Murtha: And you intend today, you're attempting to cure your refusal; is that correct?

Ms. Musick: Yes.

Mr. Murtha: And you're asking the department substitute the issues that were read at the beginning of this hearing for the issues that were just read just now; correct?

Ms. Musick: Correct.

Mr. Murtha: And you would admit to the issues that were just read to you; is that correct and do you so admit?

Ms. Musick: Yes; that is correct.

Mr. Murtha: So, you're admitting that your alcohol concentration was over .08?

Ms. Music: Correct.

Mr. Murtha: And you have received an offer now from the state's attorney's office to plead to a DUI and you're accepting that offer; is that correct?

Ms. Musick: That's correct.

Mr. Murtha: But we haven't been able to get into court to accomplish that; is that correct?

Ms. Music: Correct.

Mr. Murtha: So, you would fulfill all the requirements to cure your refusal except you're unable to do it in the amount of time allotted; is that correct?

Ms. Music: Correct.

Mr. Murtha: And you're asking that the department suspend your license and place [sic] a revoke in your license; is that correct?

Ms. Musick: Correct.

Tr. 19, l. 16 – Tr. 20, l. 17.

[¶28] While it is true that Musick testified at the hearing regarding her desire to cure her refusal, she did not testify as to why the statutory requirements of N.D.C.C. § 39-20-04(2) were not able to be met in a timely manner. For all the hearing officer knew, the reason Musick could not get into court was due to her own actions. More particularly, Musick did not raise an equal protection argument before the hearing officer. At no time during the hearing did Musick claim she was denied equal protection under the law as to the N.D.C.C. § 39-20-04(2) statutory requirements. The hearing officer simply determined that "[t]he department has no authority to substitute issues as directed by the NDCC." App. 4.

[¶29] This Court has stated that "[i]t is well settled that one of the guidelines for an appeal on any issue or contention is that the issue on appeal was adequately raised in the lower court." Williams Cnty Soc. Serv. Bd. v. Falcon, 367 N.W.2d

170, 176 (N.D. 1985). See also Skjonsby Truck Line, Inc. v. Elkin, 325 N.W.2d 271, 275 (N.D. 1982)(general rule "also applies to consideration of issues on appeal from administrative agency proceedings."); John T. Jones Construction Co. v. City of Grand Forks, 2003 ND 109, ¶ 18, 665 N.W.2d 698 ("It is axiomatic that an issue or contention not raised or considered in the lower court cannot be raised for the first time on appeal from judgment."); State v. Wishnatsky, 491 N.W.2d 733, 734-35 (N.D. 1992)("It is a well-established tenet of appellate procedure that objections to the introduction of evidence must be raised at the very time the evidence is introduced, or the objections will be waived.") The rule that an argument cannot be raised for the first time in an appeal is not a mere technicality. Rather, there are sound reasons for the rule. Specifically, this Court has elaborated as follows:

> The rule limiting appeal to issues raised in the trial court is based upon the principle that it is 'fundamentally unfair to fault the trial court for failing to rule correctly on an issue it was never given the opportunity to consider.' Messer, at ¶ 10 (quoting 5 Am.Jur.2d *Appellate Review* § 690 (1995)). As we noted in *Estate of Peterson*, at ¶ 19, '[t]he purpose of an appeal is to review the actions of the trial court, not to grant the appellant the opportunity to develop and expound on new strategies or theories.'

Roise v. Kutz, 1998 ND 228, ¶ 9, 587 N.W.2d 573 (emphasis added.) Therefore, it would be unfair to fault the hearing officer for denying Musick's request to cure her refusal under N.D.C.C. § 39-20-04(2) when the hearing officer was not on notice that Musick was challenging the statute on constitutional grounds.

[¶30] Further, the district court did not address Musick's equal protection argument because Musick did not properly brief the issue. According to the

district court "Musick has failed to properly raise and brief this issue. Therefore, the Court declines to address the alleged error by the Hearing Officer." App. 25.

[¶31] For these, reasons Musick's argument fails and the hearing officer did not err in not giving Musick the opportunity to cure her refusal.

CONCLUSION

[¶32] The Department respectfully requests this Court affirm judgment of the Stark County District Court and affirm the hearing officer's decision revoking Musick's driving privileges for 180 days.

Dated this 5th day of November, 2015.

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Lynh Hong Musick, Appellant, v. Grand Levi, Director of the North Dakota Department of Transportation, Appellee.	)	**Supreme Ct. No. 20150252** **District Ct. No. 45-2015-CV-00240**

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

[¶1] Donna J. Connor states under oath as follows:

[¶2] I swear and affirm upon penalty of perjury that the statements made in this affidavit are true and correct.

[¶3] I am of legal age and on the 5th day of November, 2015, I served the attached **BRIEF OF APPELLEE** upon Lynh Hong Musick, by and through his attorney, Thomas F. Murtha IV, by placing a true and correct copy thereof in an envelope addressed as follows:

Thomas F. Murtha, IV
Attorney at Law
P.O. Box 1111
Dickinson, ND 58602-1111

and depositing the same, with postage prepaid, in the United States mail at Bismarck, North Dakota.

Donna J. Connor

Subscribed and sworn to before me
this 5th day of November, 2015.

Notary Public

MELISSA CASTILLO
Notary Public
State of North Dakota
My Commission Expires Oct. 15, 2019